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IN THE

Supreme Court of the United States

October Term, 1966

No. 526

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION;

and

GREAT NORTHERN RAILWAY COMPANY; UNION PACIFIC RAILROAD COMPANY; SPOKANE INTERNATIONAL RAILROAD COMPANY; CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY; NORTHERN PACIFIC RAILWAY COMPANY; SOUTHERN PACIFIC COMPANY; AMERICAN POTASH & CHEMICAL CORPORATION; and STAUFFER CHEMICAL COMPANY,

Appellants,

v.

SASKATCHEWAN MINERALS (SODIUM SULPHATE DIVISION), a Crown Corporation,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

JURISDICTIONAL STATEMENT OF RAILROAD AND SHIPPER APPELLANTS

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Opinions Below

The opinions of the District Court are reported at 253 F. Supp. 504. The decision of the Interstate Commerce Commission is reported at 325 I.C.C. 621. The District Court's opinions and judgments are set forth in Appendices A, B, C and D of the Jurisdictional Statement of the United States and Interstate Commerce Commission, to which the Court is respectfully referred.

Jurisdiction

This action was brought under 28 U.S.C. 1336. 1398, 2284 and 2321-2325, to set aside an order of the Interstate Commerce Commission. The judgment of the District Court was entered January 27, 1966. A motion for amendment of judgment was filed on February 4, 1966. A supplemental Memorandum Decision was filed March 3, 1966, and amended judgment of the Court was entered April 6, 1966. Intervening defendants filed notice of appeal in the District Court on June 2, 1966, and defendants United States and Interstate Commerce Commission filed notice of appeal on June 6, 1966. By order of the District Court dated August 5, 1966, the time of appellants to file their Jurisdictional Statement was enlarged to and including September 6, 1966.

The jurisdiction of the Supreme Court to review the judgment of the District Court on direct appeal is conferred by 28 U.S.C. 1253 and 2101(b). *United States* v. *Drum*, 368 U.S. 370 (1962).

Question Presented

The appeal presents this question: Where the District Court has set aside, as not adequately supported by the evidence, an order of the Interstate Commerce Commission finding that railroad rates were not shown to be unduly prejudicial to the shipper-plaintiff, has the District Court erred and exceeded the proper function of a reviewing court by peremptorily instructing the Commission to grant relief to the plaintiff and by

prohibiting the Commission, on remand, from receiving additional evidence on the right of the plaintiff to be granted relief?

Statute Involved

Section 3(1) of the Interstate Commerce Act, 49 U.S.C. 3(1), provides:

> It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Statement

A. Proceedings Below

Appellee is a producer at Chaplin, Saskatchewan, of crude sodium sulphate (salt cake) used in the manufacture of kraft pulp. It complained to the Inter-

state Commerce Commission that the railroad rates on salt cake from Chaplin to points in Oregon and Washington were unduly prejudicial in that such rates were higher than the rates from California producing points for comparable distances to the same destinations. The California origins are located on, or are directly accessible to, a coastwise waterway that extends to the destinations in the Pacific Northwest. Chaplin, an inland point in Canada, has no access to a water route. The railroads and California producers, in defense of the rates, introduced evidence to show that the rail rates from California are set at levels designed to meet water competition. The Commission found that this made a substantial dissimilarity of circumstances which justified the differences in rates. In arriving at its decision that a sufficient degree of water competition exists, the Commission considered the cumulative effect of all the individual factors which were introduced to demonstrate that present rail rates are water compelled.

Upon review the District Court concluded that the evidence of record did not demonstrate such water competition as would justify a disparity in rates. The lower court held, as a matter of law, that a firm commitment by a water carrier was needed effectively to establish the existence of water competition.[1]

---

[1] Appellant railroads and shippers are prepared to offer evidence not only of a firm commitment by a water carrier, but of actual water transportation of the commodity in question between the Pacific Coast points involved. Appellants herein will ask the Commission to receive this evidence if the Commission's discretionary right to receive further evidence is established by this appeal.

B. The Extraordinary Remand

In its opinion of December 8, 1965, the court stated:

> "'The order appealed from is set aside and the matter remanded to the Interstate Commerce Commission for further proceedings in accordance herewith."

On December 21, 1965, counsel for plaintiffs issued a notice of Proposed Order to be submitted January 21, 1966. The Proposed Order contained the following clause:

> "That the subject matter of this proceeding be and it hereby is remanded to the Interstate Commerce Commission with the direction hereby that said Commission proceed to grant to the plaintiff relief, in alternative form, pursuant to Section 3(1) . . ."

Objections to the proposed order of plaintiff were filed by the Commission on January 13, 1966; by intervening railroad defendants on January 17, 1966; by intervening defendant Stauffer Chemical Company on January 18, 1966; and by intervening defendant American Potash & Chemical Corporation on January 19, 1966. The objections uniformly pointed out that proper procedure, where a court determines that an order of an administrative agency is not supported by substantial evidence, is for the court to remand the case to the agency for further proceedings consistent with the opinion of the court. Proposed Orders in conformity with this position were submitted to the court by the Commission and intervening defendants.

On January 27, 1966, the court issued its judgment, setting aside the orders of the Commission and ordering that they:

> ". . . be, and they are hereby, . . . remanded to the Commission for further proceedings with instructions to grant relief to the plaintiff in accordance with the opinion heretofore entered by this court."

A Motion for Amendment of Judgment, dated February 4, 1966, was filed by the Commission, seeking clarification as to:

> ". . . whether the Interstate Commerce Commission is free, under said judgment, to re-open the proceeding for additional evidence or to take any other action which is consistent with the opinion of this Court dated December 8, 1965."

On March 3, 1966, the court issued a Supplemental Memorandum Decision stating:

> "It is the intention of this court that the Interstate Commerce Commission be free under said judgment to open the proceedings for the receipt of additional evidence limited, however, to the nature of the relief to be granted to the plaintiff. It is not intended that the Commission receive additional evidence on the right of the plaintiff to be granted such relief."

An Amended Judgment was presented by plaintiffs on March 8, 1966. This judgment was adopted by the Court and entered on April 6, 1966. It ordered that:

> ". . . the proceedings be remanded to the Commission for further proceedings with instructions

to grant relief to the plaintiff in accordance with the opinion heretofore entered by this court on December 8, 1965, and the Supplemental Memorandum Decision entered by this Court on March 3, 1966."

The Question is Substantial

The question presented on this appeal involves an important and fundamental theory of administrative law. The specific issue concerns the carefully guarded balance of administrative and judicial power upon judicial review of agency action. In the case below, a three-judge court, convened pursuant to 28 U.S.C.A. 2325, concluded as a matter of law that there was not sufficient evidence of record to support the decision of the Interstate Commerce Commission. However, instead of remanding for further proceedings to determine, in light of the court's opinion, *whether* relief should be granted, the case was remanded with specific instructions to grant affirmative relief. The judgment wholly withdraws the agency prerogative of making a reconsidered decision based on additional evidence.

The effect of the judgment for which review is sought is to deny the Interstate Commerce Commission the opportunity to render a decision which Congress has entrusted to agency expertise.[2] This Court

[2] The essence of the question presented to the Commission was whether an "undue or unreasonable" preference or prejudice exists on the facts of this case. 49 U.S.C. 3(1). Since resolution of this issue requires the analysis and weighing of a variety of transportation circumstances and conditions, and since evaluation of these types of factors is within the special competence of the Commission, the facts of this case would appear to present the strongest possible requirement for final agency decision.

has determined that where a three-judge court sets aside a decision of the Interstate Commerce Commission based on lack of substantial evidence, the Commission may reconsider its decision in light of the legal principles set down by the three-judge court. It is not the province of a three-judge court to render a final judgment, the effect of which is to preclude the Commission from making an administrative decision based on the corrected legal doctrine. *Arrow Transportation Co.* v. *Cincinnati, N.O. & T.P. Ry.*, 379 U.S. 642 (1965). *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940).

The traditionally recognized rule is that judicial review of agency action is limited to questions of law. It is error for a court to render a decision which has the effect of making a final agency determination. As this Court stated in the case of *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20:

> ". . . the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the Commission for reconsideration."

This Court has recognized that effective "reconsideration" requires that the agency be free to reopen proceedings to take any additional evidence required to render a sound administrative decision, based on the legal guidelines provided by the reviewing court.

> "On review the court may thus correct errors of law and on remand the Commission is bound to act upon the correction. . . . But an administrative determination in which is imbedded a legal question open to judicial review does not impliedly

> foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge." *Federal Comm'n* v. *Broadcasting Co., supra,* at p. 145.

It would be impossible indeed to expect the Interstate Commerce Commission to enforce the "legislative policy committed to its charge" if, on remand, it is foreclosed from taking further evidence. Accordingly this Court has adhered to the policy of permitting a federal agency, on remand, to take additional evidence prior to making its final decision. As stated in *Konigsberg* v. *State Bar of California,* 366 U.S. 36, at pages 43-44:

> ". . . recalling Konigsberg for further testimony, the Committee did only what this Court has consistently held that federal administrative tribunals may do on remand after a reviewing court has set aside agency orders as unsupported by requisite findings of fact. *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U.S. 134; *Fly* v. *Heitmeyer,* 309 U.S. 146."

Because the judgment of the three-judge court in this proceeding contravenes established judicial policy[3] and precedent, summary reversal of the lower court's judgment is appropriate. *Arrow Transportation Co.* v. *Cincinnati, N.O. & T.P. Ry., supra.*

---

[3] Recognizing the Commission's discretionary power to order further proceedings is also in harmony with legislative policy, as expressed in 49 U.S.C. 17(6), which gives the Commission power at any time to grant rehearing, reargument, or reconsideration if sufficient reason therefor be made to appear.

Conclusion

It is submitted that the question presented by this appeal is substantial, in that it directly defines the function and power of the Interstate Commerce Commission and, by analogy, all federal agencies. For the reasons advanced above, protection of the objectives entrusted by Congress to final administrative decision requires correction of the unprecedented assumption of power by the court below. Accordingly the District Court should be directed to remand the case to the Interstate Commerce Commission for further proceedings consistent with its opinion of December 8, 1966.

Respectfully submitted,

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Certificate of Service

I, ARTHUR A. ARSHAM, attorney for Stauffer Chemical Company, one of the appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 1st day of September, 1966, I served copies of the foregoing Jurisdictional Statement to the Supreme Court of the United States on the several parties thereto, as follows:

1. On the Interstate Commerce Commission, by mailing a copy, in a duly addressed envelope, with air-mail postage prepaid, to Robert W. Giannane, its General Counsel, at the offices of the Commission, Washington, D. C. 20423.

2. On Mrs. Betty Jo Christian, Attorney for the Interstate Commerce Commission, who represented the Commission in the appeal for which review is sought herein, by mailing a copy, in a duly addressed envelope, postage prepaid, to the offices of the Commission, Washington, D. C. 20423.

3. On the Solicitor General, by mailing a copy, in a duly addressed envelope, with air-mail postage prepaid, to the Department of Justice, Washington, D. C. 20530.

4. On Saskatchewan Minerals, a Crown corporation, plaintiff in the action and appellee herein, by mailing copies in a duly addressed envelope, with air-mail postage prepaid, to its attorneys of record, Robert

Baronsky, Esq., Beresford & Booth, 700 Olympic National Life Building, Seattle, Washington 98104.

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APPELLEE'S MOTION TO AFFIRM AND BRIEF IN SUPPORT OF MOTION

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MOTION TO AFFIRM

I. Statement of Object

The appellee respectfully moves that this Court affirm the Amended Judgment of the District Court entered on April 6, 1966, for the reason that the following question presented by the appellants is so unsubstantial as not to require further argument: Did the District Court have the discretionary power to limit the scope of its remand to the Interstate Commerce Commission, considering the

general nature of the administrative proceeding involved and the nature of the issue determined on review?

II. Statement of Facts Upon Which the Motion to Affirm Is Based

The appellee, a crown corporation of the Province of Saskatchewan, Canada, commenced an adversary-type proceeding by complaint to the Interstate Commerce Commission naming certain railroads as defendants and alleging, in part, a violation of Title 29, U.S.C.A. 3 (1) of the Interstate Commerce Act. Specifically, the appellee complained that higher all-rail rates for shipment of its product to particular Pacific Northwest destination points were unduly prejudicial to it in view of lower all-rail rates for shipments of the substantially identical product of competing California-based shippers from greater rail distances to the same destination points. The appellee requested relief by a reduction in the Saskatchewan rate, an increase in the California rate or an adjustment in both rates, any of which would result in a parity of rates. The major competing shippers intervened in the Commission proceeding and are appellants in this Court.

In the Commission proceeding, the defendant railroads and the intervening shippers defended the lower rates for the California-Pacific Northwest movements on the basis of asserted Pacific Coast water route competition to the destination points involved. The Commission concluded, after full hearing, that the evidence established water competition for the California-Pacific Northwest rail movement to such an extent as to justify the lower rates.

Appellee requested a review by a three-judge District

Court which concluded, following presentation of briefs and oral argument, that the record did not contain substantial evidence to support the Commission's finding of water competition justifying the disparity in the rail rates. There having been no errors by the Commission as to (1) the correct legal propositions or statutory standards to be applied, (2) exclusion of relevant evidence, or (3) admission of irrelevant evidence, the District Court ultimately remanded the matter to the Commission and specifically instructed it to grant relief to the appellee but left the Commission free to exercise its administrative discretion in framing the nature of the relief to be granted.

BRIEF IN SUPPORT OF MOTION

I. The Question Presented by the Appellants Is Not Substantial

The limited nature of the remand by the District Court was a proper exercise of its judicial power following review of the administrative proceeding. The appellants propose that the District Court had no alternative, under the circumstances, but to remand the case to the Commission "for further proceedings not inconsistent with the Court's opinion" and that it could not, in any manner, limit the scope of such "further proceedings." This Court never has given validity to such a sweeping proposition. It is fundamental that a court reviewing an administrative decision sits essentially as a court of equity. In *Ford Motor Company v. National Labor Relations Board*, 305 U.S. 364 (1939), the Court recognized that equity powers are available in reviewing agency action and, without stepping into the administrative province, a court may

adjust relief to the exigencies of a particular case in accordance with equitable principles. That it is grossly incorrect to suggest a court may never limit the nature or scope of the agency proceeding upon remand is seen from the following instances where limited remands were applied or recognized as valid:

Ford Motor Company v. National Labor Relations Board, supra.

Morand Brothers Beverage Co. v. National Labor Relations Board, 204 F.2d 529 (7th Cir. 1953).

United Airlines v. Civil Aeronautics Board, 281 F.2d 53 (D.C. Cir. 1960).

Tascarora Indian Nation v. Federal Power Commission, 265 F.2d 338 (D.C. Cir. 1959).

II. The Extent of a Reviewing Court's Discretion as to the Form of the Remand Depends Upon the Nature of the Agency Proceeding Reviewed and the Precise Nature of the Issues Decided

A. The Nature of the Agency Proceeding.

Agency-initiated proceedings conducted for legislative or rule-making purposes and *ex parte* proceedings, concerning requests for particular regulatory grants, involve the application of broad public policies. It appears clear from the case authorities that, following review of such proceedings, a court seldom, if ever, should place limitations on a remand, since the agency must be left to its "continuing initiative to realize the public purposes." To be contrasted are the agency proceedings for adjudicative purposes which are cast in an adversary mold similar to any court litigation brought by one private interest against

another. Where the proceeding is so postured, depending upon the nature of the issues decided by a reviewing court, it may be proper to apply traditional "law of the case" doctrine in formulating the remand to the agency. Suffice to say that the varying kinds of agency proceedings, covering a spectrum from pure legislative proceedings to pure adjudicative proceedings, require that each situation be treated separately by a reviewing court in applying the technique of remand.

B. The Nature of the Issues Presented on Review

Whether a remand may be limited or not also necessarily depends upon the kind of correction made by the reviewing court. When an agency makes findings after having prejudicially excluded relevant evidence or included irrelevant evidence, then, upon holding that the agency so erred, a court should remand in a fashion to allow the agency to reconsider the factual issues again in light of the properly constituted record. A remand under such circumstances occurred in *National Labor Relations Board v. Donnelly*, 330 U.S. 219 (1947). Also, when an agency renders its conclusions on the basis of an erroneous rationale or improper understanding of the applicable legal principles, which often is reflected for a court to correct the error and remand to permit reconsideration of the evidence in light of the correct legal principles. Instances of remands under such circumstances are *Konigsberg v. California State Bar*, 366 U.S. 36 (1961); *Arrow Transportation Company v. Cincinnati, N.O. & P. Ry.*, 379 U.S. 642 (1965); and *Securities Exchange Commission v. Chenery*, 322 U.S. 194 (1947).

In each of the aforementioned review situations, the